

## Section 64 Review into Local Loop Unbundling: Legal issues – interpretation and definitions

Hello, my name is Michael Jamieson and I am BCL's Legal Manager and in-house Legal Counsel.

### Introduction

1. My submissions are made in the alternative to the preceding submissions made by Geoff Lawson, Philippa Bowron, and Susan Stone.
2. If (contrary to BCL's submissions) the Commission concludes that it should recommend that unbundling proceed now, the question then is: What may be lawfully 'unbundled'?
3. The answer to this question depends upon the interpretation of the Telecommunications Act (Act).
4. In this submission I will:
  - comment on the Commission's approach to interpretation;
  - comment on some specific definitions under the Act and in the Draft Report; and
  - make some concluding remarks.

### Interpretation

5. Section 5 (1) of the Interpretation Act 1999, under the heading 'Ascertaining the meaning of legislation', provides:

*'(1) The meaning of an enactment **must** be ascertained from its **text** and in the light of its **purpose**.'* [Emphasis added]
6. BCL submits that: Section 5(1) and the purposive approach to statutory interpretation require first that regard be had to the text of the Act. If the text of the Act in its natural ordinary meaning is clear and unambiguous, and is consistent with the purpose of the Act, then the text must be applied.
7. On the other hand, if the text is unclear, either through ambiguity, or because the literal meaning of the text would produce an absurd result or one that is inconsistent with the purpose of the Act, the plain meaning of the text of the Act may be departed from, to the extent necessary to give effect to the purpose of the Act.
8. However, *'[the] interpretation is confined by the text that Parliament has enacted. A judge or other interpreter is not entitled to legislate, or to go beyond the text and impose solutions simply because they seem fair and*

*just*. [Burrows, Statute Law in New Zealand, page 115] The other authority for this proposition is the Privy Council case cited in BCL's written submission at paragraph 4.4 – CIR v Auckland Harbour Board.

9. I would restate this proposition in the current context to say that, with respect, the Commission may not go beyond the text of the Act and impose solutions simply because to do so seems to the Commission to better give effect to the purpose of the Act.
10. I contrast the approach that I have outlined with paragraph 261 of the amended Draft Report:

*'The definitions within the Act **provide some direction** as to the limitations of the data network review required under section 64. However, the Commission also considers that such definition [i.e. the statutory definitions] must not undermine any practical implementation or effectiveness of unbundling. To do so would be inconsistent with section 18(1) [the purpose of Part 2 of the Act].'* [Emphasis added]
11. In the amended Draft Report, the Commission's approach to interpretation seems to expand from Paragraph 261 and the Commission's reasoning seems to be as follows:
  - Section 18 (1) of the Act provides that the purpose of the Act is to promote competition for the long term benefit of end users.
  - The Commission considers that unbundling Telecom's Local Loop Network and Telecom's Public Data Network will promote competition for the long term benefit of end users.
  - Therefore, the Commission may interpret the words of the Act in the way that will, in the Commission's opinion, best give effect to Section 18, and is not limited by the text of the Act.
12. BCL submits that in taking this last step the Commission has gone beyond the text of the Act, either because it considered that it seemed 'fair and just' to do so, or because it has considered that to do so would better give effect to the purpose of the Act.
13. BCL respectfully submits that this amounts to unlawful 'legislation' on the part of the Commission and is outside the boundaries permitted by the purposive approach to interpretation.

## **Definitions**

14. BCL wishes to focus on the following examples of the Commission's approach to interpretation:
  1. The definition of 'lines' for the purposes of the definition of Telecom's Local Loop Network.
  2. The definition of 'Telecom's fixed PDN'. This has two main

elements of importance to BCL:

- a) The inclusion of third party's elements within this definition.
- b) The potentially narrow definition of 'private' and hence broad definition of 'public' adopted by the Commission for the purposes of defining 'public data network'.

15. BCL also wishes to comment briefly on:

3. The definition of 'backhaul'; and
4. The definition of 'bitstream' access.

## 1. Lines

16. Paragraph 193 of the amended Draft Report states:

*'Telecom also argues that the definition of "lines" in the Act is confined to physical lines rather than logical paths or derived channels. The Commission does not agree that the definition of lines in the Act is limited in this way and considers that it can include logical paths and derived channels. The wording of the definition of 'line' in the Act is not limited to physical lines and is written in terms of conductors used or intended for use for transmission or reception of signs'.*

17. BCL strongly disagrees with the Commission's conclusion on this point.

18. 'Line' is defined in the Act to mean:

*'a wire or a conductor of any other kind (including a fibre optic cable)...',  
and includes:*

*'any pole, insulator, casing, fixture, tunnel, or other equipment or material used or intended to be used for supporting, enclosing, surrounding or protecting any of those wires or conductors...'*

19. Logical paths and derived channels operate at OSI Layers 2 and 3 and pass over conductors, but are not conductors themselves in the ordinary and natural meaning of the word, nor does it align with common industry usage of the word

20. I typed the word 'conductor' into the dictionary on the ITU website. I got 36 hits. With one exception, they relate to physical conductors, and in most cases there is an element of a metallic conductor. The exception will be of relevance to the Commission: 'conference conductor' is defined to mean a person who conducts a conference. Significantly logical paths or derived channels did not come up in the search results.

21. BCL submits that the definition of 'line' contemplates physical conductors only and not logical paths or derived channels. The context is wire, fibre

and other conductors and associated physical infrastructure required to support and protect those wires or conductors, and not applications, layer 2 tunnelling protocols and other services associated with logical paths or derived channels.

22. In the Act 'line' is clearly and consistently used in contra-distinction to 'radio frequency', for example in the definition of 'telecommunications link', which means a 'line, radio frequency or other media'. 'Radio frequency' means electromagnetic waves ... propagated in space without artificial guide.
  23. BCL submits that these definitions make a clear and careful distinction between 'wireline' and 'wireless' that is maintained consistently throughout the Act.
  24. If, as TelstraClear has submitted [and I refer here to paragraph 202 of the amended Draft Report], the legislature meant to adopt the equivalent of the FCC definition 'transmission facility' in the definition of local loop network, the legislature would have used the term 'telecommunications link', as it has elsewhere in the Act when it wished to include both wireline and wireless, or lines and radio frequency and other media.
- By broadening the definition of 'lines' beyond physical conductors, such as wires and fibre optic cables, in this way, the Commission risks:
    - departing from the usual and established industry usage and definitions, which reflect the natural and ordinary meaning of the words in the context in which they are used.
    - 'blurring' the careful and consistent distinction in the Act between 'lines' and 'radio frequency', or 'wireline' and 'wireless'.
    - 'pulling a thread' in the scheme of the Act without having fully analysed the consequences: for example, the definition of 'lines' is important in the definition of 'existing works' used in Part 4 of the Act, and similar wording is used in a similar context in the Electricity Act.[And also the RMA. Also Telecommunications lines are subject to rates. The TelstraClear proposal would arguably result in logical paths and derived channels being rateable – with a consequent cost increase to be passed on to consumers. This would not be consistent with the purpose of the Act]
    - allowing bitstream access in through the backdoor of an unlawful statutory interpretation when it should be addressed transparently through the Commission's discussion of bitstream access under the Schedule 3 investigation. I submit that this last point is particularly significant. BCL considers that access to the logical paths and derived channels that pass over the conductor is equivalent to bitstream access by another name.

[Analogy with power lines – Telecom Auckland Ltd v Auckland City Council]

## 2 Definition of Telecom's fixed PDN

### (a) Inclusion of third parties' elements

25. Section 64 of the Act prescribes what the Commission may lawfully make a recommendation to the Minister on, and refers to *'access to the unbundled elements of ... Telecom's fixed PDN'*.
26. 'Telecom's' [possessive case] clearly means 'of or belonging to Telecom'.
27. 'Telecom' is defined in the Act to mean: *'Telecom Corporation of New Zealand Limited and includes its subsidiaries. The Companies Act definitions of 'subsidiary' apply'*.
28. This is clear and unambiguous, and is consistent with the purpose of the Act.
29. *'Fixed PDN' is defined in the Act to mean: 'a PDN or that part of a PDN that connects an end-user's building to a data switch or equivalent facility'*.
30. *'PDN' is defined in the Act to mean: 'a data network used, or intended for use, in whole or in part, by the public'*.
31. There is no statutory authority for reading 'Telecom's fixed PDN' as extending to elements of fixed PDN's belonging to any third party. To do so is arguably unlawful or *ultra vires*. Put simply, 'Telecom's fixed PDN' does not mean 'BCL's fixed PDN', 'TelstraClear's fixed PDN' or 'Woosh's fixed PDN', if those parties in fact have fixed PDN's.  
  
[BCL reserves its position]
32. The Commission appears to be interpreting 'Telecom's' as including assets leased or controlled by Telecom.
33. BCL accepts that assets leased by Telecom, in the strict of the sense of Telecom having the right of exclusive possession, maybe regarded as 'Telecom's'.
34. However the notion of 'control' is vague and uncertain in this context. It is not defined in the Draft Report.
35. If the Commission is concerned about avoidance, it should provide for specific anti-avoidance mechanisms. For example, capturing any sale and lease back by Telecom where Telecom has the right of exclusive possession, or any other arrangement whereby Telecom divests itself of legal ownership of existing assets, but retains or acquires **exclusive** control.

36. With respect, we believe that the Commission may be proceeding on the basis of a misunderstanding: Telecom does not have any control of the BCL network, nor will any other retail service provider have control of it. None of our broadcast customers have control of our broadcast network, and as Geoff Lawson has explained we have transferred our wholesale broadcast model to our telecommunications business.
37. BCL respectfully submits that the Commission should not attempt to combat potential avoidance measures through broad, vague and ill-defined interpretations of statutory terms.
38. Also, BCL respectfully submits that the Commission should not try to extend the ambit of the Act by adopting broader definitions than those specified in the Act, even if the Commission considers that it would better give effect to the purpose of the Act.
39. BCL respectfully submits that it is unlawful for the Commission to do so.

**(b) Telecom's fixed PDN - 'Private' vs 'Public' data network**

40. In the Act:

*'PDN or public data network means a data network used, or intended for use, in whole or in part, by the public.'*
41. BCL agrees with the Commission that 'public' services are those that are offered to the public, rather than necessarily those being used by the public.
42. Thus there is a distinction between wholesale networks that are not offered to, or directly accessible by, the public, and retail networks that are offered to the public.
43. BCL submits that in the amended Draft Report the Commission's distinction between 'public' data networks and 'private' data networks, and its treatment of wholesale only networks, is unclear.
44. At paragraph 293 of the amended Draft Report the Commission states:

*'...wholesale components of an end-to-end service can be included where they satisfy the criteria outlined in paragraph 277 [i.e. 'leased or controlled by Telecom']'.*
45. BCL has already addressed the 'leased or controlled by Telecom' point above.
46. Then, at paragraph 295, the Commission states:

*'The Commission considers that a **private** data network must be **built** exclusively for an individual customer. The Commission notes that a public data network may be application specific. For the purposes of determining the end-user of a service, the Commission does not*

*consider that, in all instances, it will be the physical user of the service, but rather **the provider of the service**, e.g. the EFTPOS network.'*  
[Emphasis added]

47. If in paragraph 295:

*'Built'* means either physically built or 'virtually built'

And:

*'provider of the service'*, where there is a wholesaler and a retailer, means the retailer of the service and not the wholesaler,

Then:

BCL considers that this definition of 'private data network' is satisfactory and will properly take account of wholesale-only networks such as BCL's and will not be too narrow. Therefore the definition of 'public data network' adopted by the Commission will not be too broad.

48. However, if either *'built'* or *'provider of the service'* are to have narrower meanings, the definition of *'public data network'* will be broader than that contemplated by the Act.
49. The Commission should make its intended interpretation of these definitions clearer and more explicit.
50. BCL submits that there should be a clear statement that wholesale-only data networks to which only retail service providers, and not the public, can gain access are private data networks and are not public data networks for the purposes of the Act.

### **3. Definition of Backhaul**

51. At paragraph of 244 of the Draft Report the Commissioner states:

*'Backhaul refers to the transmission from the access provider's exchange to the access seeker's premises. Backhaul transmission should be provided by the access provider to the access seeker to provide access to unbundled services. This service is a wholesale service which provides transmission capacity between an access provider's exchange and an access seeker's nominated site'.*

52. In the context of the Act 'backhaul' can have the alternative meaning of:

*'transmission from the access providers exchange to the nearest connection point to the spur or backbone'.*

53. BCL usually regards the words 'backbone', 'trunk' and 'core network' as meaning the same thing, and a 'spur' as meaning a main branch of the backbone or trunk network.

54. BCL considers that workable and effective wholesale competition exists on spurs and the backbone network, and that regulation of those services is neither necessary to give effect to the purpose of the Act, nor desirable.
55. For backhaul from the access provider's exchange to the point of interface with the wholesale network-provider's network (i.e. the point of access to the spur or backbone), competition exists in some geographic markets and not others.
56. Where competition exists, regulation of the backhaul services is not required. Where competition does not exist regulation of backhaul, in the narrow sense of backhaul to the point of interface with the wholesale network-providers network is all that is required to give effect to the purpose of the Act.
57. BCL submits that a wider definition of backhaul would negatively, and unnecessarily, impact on the existing wholesale spur and backbone 'backhaul' market.
58. If the narrow definition of backhaul is adopted it would not be necessary to regulate co-location services at the access providers exchange in order to give effect to the purposes of the Act.

#### **4. Definition of Bitstream**

59. BCL agrees with the Commission that bitstream access should **not** be recommended for regulation.
60. As set out in BCL's written submission at paragraphs 4.33 and 4.34, BCL submits that, if contrary to the amended Draft Report the Commission does decide to recommend bitstream access for regulation, then :
  - (a) 'backhaul' elements of bitstream access should not include the spur and backbone transport of traffic between cities and towns; and
  - (b) a more appropriate definition of bitstream access is :

*'The delivery of the bitstream service to the closest aggregation point to the end-user and delivery of the bitstream traffic to the access seeker's chosen backhaul supplier'.*
61. This would ensure that spur and backbone networks were not included in the service definition and would mean that the bitstream access definition did not interfere with the existing competitive spur and backbone 'backhaul' market.

## Final Comments

62. In closing I would like to reiterate the point made in paragraph 1.3 of BCL's written submission that BCL reserves its position on matters not raised in its submission, and failure by BCL to comment does not necessarily indicate agreement with those matters.
63. As outlined in paragraph 1.4 of BCL's written submission, BCL reserves its position on the Schedule 3 investigations.
64. I wish to make one observation in passing: clause 3(1) of Schedule 3 requires the Commission to hold a conference or a public hearing. The difference between the two is that, under clause 4 (2) (b) of Schedule 3, all information and opinions presented or expressed at the public hearing **must** be considered by the Commission, but this is not the case for those presented or expressed at a conference.
65. It could be argued that under the natural and ordinary meaning of the words that this current proceeding is, in substance, a public hearing rather than a conference. However, I do not wish to take a position on that at this time.
66. I do not wish to take this point any further as, based on the Commission's past practise, I am confident that the Commission, will take into consideration all information and opinions presented or expressed in this forum. I merely wish to bring this point to the Commission's attention and to reserve BCL's position on it.
67. That concludes my submissions. Thank you.